

**Stamford Water Company and Utility Workers  
Union of America, AFL-CIO. Case 39-CA-  
1116**

4 January 1984

**DECISION AND ORDER**

**BY CHAIRMAN DOTSON AND MEMBERS  
HUNTER AND DENNIS**

On 29 March 1983 Administrative Law Judge James F. Morton issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed limited exceptions and both a supporting and an answering brief, and the General Counsel filed a brief answering the Respondent's limited exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

**ORDER**

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

<sup>1</sup> The Charging Party and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

**DECISION**

**STATEMENT OF THE CASE**

JAMES F. MORTON, Administrative Law Judge: The pleadings<sup>1</sup> put in issue whether Stamford Water Company (herein called the Respondent), in violation of the National Labor Relations Act (herein called the Act), (1) assigned more onerous work to, and thereafter discharged, its employee, John Kelly, in order to discourage its employees from supporting Utility Workers Union of America, AFL-CIO (herein called the Union), (2) unlawfully interrogated its employees about their support for the Union, and (3) gave them the impression that their activities for the Union were being kept under surveillance.

I heard the case in Fairfield, Connecticut, on January 12 and 13, 1983. Upon the entire record, including my

<sup>1</sup> The complaint issued on June 1, 1982, based on the unfair labor practice charge filed on April 19, 1982. The Respondent answered the complaint on June 8, 1982.

observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Union, and the Respondent, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION**

The pleadings established that the Respondent is a Connecticut corporation, which supplies water to consumers in Stamford and Darien, Connecticut, as a public utility and which meets the applicable Board's jurisdictional standard.

**II. THE UNION'S STATUS**

The uncontroverted testimony and related facts discussed in section III,A, below, established that the Union meets the definition of a labor organization as set out in Section 2(5) of the Act.

**III. THE ALLEGED UNFAIR LABOR PRACTICES**

**A. Background**

**1. The Respondent's location and collective-bargaining history**

In furnishing water as a public utility, the Respondent owns a 22-square mile watershed, operates a pumping station and water treatment facility in North Stamford, Connecticut, and maintains its administrative office in Stamford—about 8 miles from the North Stamford facility. It has about 22 employees engaged in performing water treatment functions, construction work, and service operations. Until early 1982 they were unrepresented for purposes of collective bargaining. The Respondent has about 20 other employees, classified as office clerical, supervisory, managerial personnel and others.

**2. Kelly's hiring interview**

Alleged discriminatee John Kelly filed an employment application with the Respondent in 1974 after his employment as a water treatment operator with the Greenwich Water Company was terminated. The employees of that company were then represented by the Union. It was not until 1977, however, that any action was taken by the Respondent on Kelly's employment application. In August of that year, the Respondent's superintendent of supply, Joseph Suttile, telephoned Kelly and asked him if he was still interested in working with the Respondent. Kelly said he was. Kelly was given a tour of the Respondent's operations. A credibility issue was raised at the hearing before me as to what was said when Kelly was interviewed by the Respondent's president, James McInerney. A resolution should be made as the testimony relates to alleged union *animus* to the Respondent's knowledge of Kelly's relationship with the Union and to one of the reasons the Respondent proffered for Kelly's discharge.

According to Kelly, McInerney interviewed him for employment and referred to the fact that he had been a union member when he worked for the Greenwich

Water Company. Kelly testified that McInerney then said that he, McInerney, did not want any union in his Company and that Kelly "could be dismissed" for "any union talk."

McInerney testified that, in that interview, he made no reference to Kelly's former membership in the Union and never warned Kelly that he could be dismissed for union talk. McInerney related that he told Kelly, during the hiring interview, that he had been advised that Kelly had been discharged by the Greenwich Water Company for drinking on the job and that, when Kelly assured him that he no longer drank, he hired Kelly on a 1-year probationary basis, instead of the normal 90-day period. McInerney also testified that he makes it a practice to inform all employees, when hiring them, that the Respondent has a policy that they are not to drink on company premises. The Respondent's superintendent of supply, Joseph Suttile, corroborated McInerney's account.

Kelly testified that he was never told by McInerney, when hired, of any policy prohibiting drinking. He testified that he and McInerney may have discussed his discharge from Greenwich Water Company but he could not recall any details.

The General Counsel called Dominick Carlucci as a witness. He is employed by the Respondent as a group leader and is the Union's chief steward for the Respondent's employees. (As noted below, the Union became the certified bargaining representative in July 1982.) He testified that, when he was hired, he was asked by McInerney about his membership in a Teamsters local and that McInerney told him then that the Respondent had no union and wanted to keep it that way. To counter this testimony, the Respondent called Maintenance Foreman Patrick Bemonte. He responded in the negative when asked by the Respondent's counsel if McInerney had ever asked him if he had been a member of a labor union.

There are aspects of both Kelly's account of his employment interview in 1977 and of those given by McInerney and Suttile which appear improbable. It seems unlikely to me that the Respondent would, as Kelly testified, expressly warn Kelly against "union talk" when it was the Respondent which took the initiative in contacting Kelly for a job and in taking him on a tour of its operations, as it did. I thus reject Kelly's account that he was so warned. I also reject McInerney's account that he gave Kelly notice that the Respondent had a policy against drinking on the job. That would have been a clearly superfluous remark in context. Moreover, it is unlikely that McInerney would have made his "usual" statement of corporate policy against drinking on its premises to a job applicant who had just assured him that he no longer touches liquor. Lastly, it appears that the Respondent has no clearly defined rules as to alcoholic beverages and it thus is unlikely that McInerney would have articulated one to Kelly in 1977. The Respondent's policy as to the use of alcohol is discussed further below.

I find that, when Kelly was interviewed in 1977, McInerney did refer to Kelly's union membership while Kelly was employed by Greenwich Water Company and

that McInerney simply told Kelly that Respondent's employees are nonunion and that he, McInerney, would like to keep it that way. That finding is consistent with the events on December 2, 1981, as discussed below.

### 3. Kelly's work record up to the start of the union campaign

Kelly's work performance in his first year with the Respondent was very satisfactory. He was promoted to chief operator. By mid-1979, however, the Respondent's evaluation of his work had changed. Kelly was demoted to an operator's level, was suspended without pay for 5 days for being absent from work, and was given an unsatisfactory rating and a less-than-average wage increase. It appears that his performance, in the Respondent's eyes, continued at that level in the ensuing years. When the union campaign began in the latter part of 1981, Kelly was working as an operator.

### B. The Union's Organizing Activities

In the latter part of 1981, Kelly was asked by several coworkers who were aware of his former membership in the Union to ask it to send a representative to talk with them. As a result, four meetings were held by one of the Union's national representatives and several employees, including Kelly. At the last of those four meetings, held on November 3, 1981, authorization cards were passed out to the four employees. One of them, Dominick Carlucci, was clearly the most active employee in getting those cards signed. Within a few days, he had secured signed cards from about 20 of the 22 unit employees, including Kelly.

Carlucci delivered those cards to the Union. On November 23, 1981, the Union's national representative, Donald Madden, telephoned the Respondent's president, James McInerney, and asked him to consent to an election among the Respondent's employees. Madden explained the election procedures in general. McInerney responded that the Respondent could not then agree.

On November 27, 1981, the Union filed a petition for an election among the Respondent's employees in Case 39-RC-283. The Respondent received a copy of that petition on December 1, 1981.

### C. The December 2 Meeting

The General Counsel contends that the Respondent's president held a meeting of unit employees at which he engaged in unlawful interrogation and created the impression among them that their union activities were being kept under surveillance.

The testimony given by witnesses called by the General Counsel and by the Respondent are in accord as to the essential details of a meeting conducted on December 2, 1981,<sup>2</sup> by the Respondent's president, McInerney, with

<sup>2</sup> Carlucci testified that he was told at the December 2 meeting to refrain from engaging in union activities. As noted elsewhere, the Respondent contended in the related representation case that Carlucci was a supervisor. In any event there is no allegation before me that the Respondent unlawfully threatened employees.

its employees. McInerney told them of the Union's petition and informed them that Carlucci and another individual, Patrick Bemonte, would not be eligible to vote as the Respondent considered them to be supervisors and that a third employee was ineligible as a guard. McInerney told them that the Respondent did not want a union. He ended the meeting with a remark that he did not know too much about unions but that Kelly did. Kelly answered that that was a long time ago.

#### *D. Carlucci's Suspension*

The Union's most active supporter, Dominick Carlucci, was suspended for several days in early December 1981 but lost no pay as a result. The testimony given by witnesses called by the General Counsel and by the Respondent as to the events leading up to his suspension is confusing but not in dispute. The following account is what I am able to glean from the record testimony. The matter is of significance as it bears on the question as to whether the Respondent knew of Kelly's activities for the Union.

Carlucci, now the president of the Union's local at the Respondent's facility, testified that he was home sick on December 1, 1981, and that, about 3 p.m. that day, he received a telephone call from Patrick Bemonte, the maintenance foreman, who asked how he felt. Kelly picked up an extension phone to interrupt their discussion to tell Carlucci that another employee, Kenneth Westcott, was complaining about them, i.e., Carlucci and Kelly. Carlucci asked Kelly to get Westcott to the phone. Kelly signaled Westcott to pick up the extension. Westcott did so. Westcott then told Carlucci, in effect, he was not performing his job properly. Westcott testified that they then had a personal agreement; Carlucci referred to it as a heated discussion.

Westcott then telephoned the Respondent's superintendent of supply, Joseph Suttile, to report his version of that phone conversation. On December 2, Westcott and Suttile told the Respondent's president, McInerney, of Westcott's version of that call. McInerney summarized it in a note he printed. Westcott signed the note and Suttile signed it to witness Westcott's signature. That note stated that, on December 1, Carlucci told Westcott that Carlucci would put a lot of pressure on Westcott if he did not go along with the Union and that he would be "out the gate."

McInerney then called Carlucci to his office. Carlucci reported there on December 2. As best as I ascertain, the discussion between McInerney and Carlucci took place after the meeting McInerney had on December 2 with the unit employees, as related above. I place the discussion afterwards because Carlucci had been at the employee meeting and had not then been sent home on suspension.

McInerney told Carlucci in their December 2 discussion that he was suspended for threatening Westcott for not supporting the Union. Carlucci told McInerney, in substance, that he never threatened Westcott, that Westcott had claimed that Kelly and Carlucci were "ruining the company," that Westcott was very upset that the Union was coming in, and that Westcott was "very anti-Union." Carlucci wanted to know why he was suspended

and why Westcott was not. McInerney told him that he needed time to think about it and that, apparently while he did so, he did not want Carlucci around. Carlucci stayed home for the next 2 or 3 days but lost no pay as a result of the suspension.<sup>3</sup>

#### *D. The Representation Case*

As noted above, the Union had filed a petition for an election among the Respondent's employees. The hearing in that case was held on December 11 and 15, 1981. Carlucci and Bemonte attended that hearing in support of the Union's claim, which was opposed by the Respondent, that they were eligible voters and not supervisors. A direction of election later issued. The election was scheduled for March 12, 1982. The Respondent sent a series of letters to the unit employees urging them to vote against the Union. The Union won and was certified on July 2, 1982.

The only union activity Kelly engaged in between the date the petition was filed and the holding of the election on March 12, 1982, was the discussions he had with his coworkers about the election and his having helped schedule union meetings and his having sat at the head table with the Union's national representative at a union meeting with the employees on March 11, 1982, the day before the election was held.

The Respondent's superintendent of supply, Joseph Suttile, gave confusing testimony as to the Respondent's knowledge of Kelly's support for the Union. At one point, he related that the Respondent's president told him in November 1981 that Kelly supported the Union. He then corrected that testimony to state that he first heard of Kelly's support after Kelly's discharge and then changed it to "a couple of days before Thanksgiving." Again, when asked what his reaction was when told that Kelly was a "union participant," Suttile said he laughed at that idea as he did not believe that Kelly could organize himself, let alone a 20-man bargaining unit. His answer was curious as he was not asked if it was ever reported to him that Kelly "organized" the unit.

#### *E. The Alleged Unlawful Assignments of More Onerous Work to Kelly*

Kelly testified that at various times in December 1981 he was assigned to perform outside maintenance duties and that previously virtually all his worktime had been spent in performing the inside duties of an operator. Carlucci's account generally corroborated that testimony. Timesheets filled by Kelly and Carlucci confirm in good part the testimony of the Respondent's maintenance foreman, Bemonte, that Kelly had spent more than a little time doing outside maintenance duties in early 1981, long before the advent of the Union. In any event, I am persuaded that Bemonte's recollection should be accepted over the testimony of Kelly and Carlucci as it is much more detailed whereas that of Kelly and of Carlucci was conclusory.

<sup>3</sup> There is no allegation that Carlucci's suspension was violative of the Act.

### F. Kelly's Discharge

#### 1. Suttile's remark to Carlucci

About a week before the election was held, Kelly called Carlucci and told him that he would be absent that day because of car trouble. When Carlucci passed that information to Suttile that day, Suttile told Carlucci that Kelly had been taking advantage of him, Suttile, because Suttile's hands were tied as a result of the pending election. Carlucci testified also that Suttile then said simply that he would wait until the election was over. That testimony is not in dispute.

#### 2. The events of March 18-23, 1982

Kelly testified as follows as to his discharge. On March 18, 1982, during his afternoon break, he took a can of beer from a coworker's car, as he had done in the past, and he brought it to the maintenance room. The Respondent's superintendent of supply, Joseph Suttile, approached him there and asked if he had a can of beer. Kelly said he did. Suttile left and returned 10 minutes later. He asked Kelly for the can of beer. Kelly had in the meantime returned the beer can to the car from which he had taken it. Suttile asked him to get it and he did. Suttile took the can and left. Fifteen minutes later, Suttile returned and with a "big smile on his face" he told Kelly that he "got" him. Kelly asked Suttile if he was going to "break [his] balls over a can of beer that wasn't even opened." Suttile responded, "[Y]ou guys have busted my balls for the last four months." Kelly was suspended on the following day after he conceded to the Respondent's president that he had a can of beer in the maintenance room on the previous day. On Monday, March 22, Kelly conducted a tour of the pumping station by school children, as had been previously arranged. On March 23, he reported to the Respondent's office in downtown Stamford. McInerney told him that he had given the matter a great deal of thought and that, as he felt that Kelly was going to drink the can of beer he had in his possession on March 18, he had to terminate Kelly's employment. McInerney told him that he would be paid for the rest of the month and he was.

Kelly further testified that he had been told at one time by the Respondent's superintendent of supply, Suttile, that the Respondent did not allow drinking on its premises but that, in fact, Suttile and various of the employees had consumed beer on the Respondent's premises during working hours on different occasions, without incident.

Joseph Suttile testified for the Respondent as follows respecting Kelly's discharge. On March 18, 1981, he saw Kelly get out of a car belonging to a coworker, Jack Dorsey. Kelly then walked "sneakily" to the pump station and Suttile assumed that Kelly had taken a can of beer. Suttile followed him and then asked Kelly where he put the beer. Kelly denied having any but, when Suttile persisted, Kelly produced a beer can from a hiding place. He asked Kelly if he intended to drink it. Kelly replied that he got it for Jack Dorsey. Suttile asked Dorsey if the can belonged to him. Dorsey replied that it did not. Suttile told Kelly to put the beer back where it

belonged. Suttile left. Kelly followed him and asked Suttile if he was "going to have [his] ass for this." Suttile replied that he could not help him, that he put up with enough but "can't help [Kelly] anymore." Suttile then telephoned the Respondent's president, McInerney, who told him to get the can of beer and to suspend Kelly for the rest of the day. Suttile complied and told Kelly to go home. On the following day, Suttile and McInerney interviewed Kelly and Dorsey and that evening they reviewed Kelly's "complete history" for an hour. Suttile recommended that Kelly be fired as the March 18 incident was the "last straw."

Dorsey testified for the General Counsel and had considerable difficulty recalling specific details. The information he gave in a prehearing affidavit, which he said must be true, supported Suttile's account, insofar as Dorsey's presence was involved.

The testimony given by the Respondent's president, McInerney, insofar as it concerns what Suttile reported to him, essentially tracks Suttile's account of that report. McInerney testified further that, when he discharged Kelly on March 23, he "told Kelly, based upon his conduct and the incidents over the past," that his employment was no longer desirable and that Kelly would be paid until the end of April as he had earned vacation pay and severance pay.

The only credibility issues of substance are whether Suttile told Kelly, in the vernacular, that he (Suttile) "got" Kelly because of what the employees did to him in the preceding 4 months and whether Kelly was told on March 23 that he was discharged because McInerney felt that Kelly intended to drink the can of beer he had brought to his workplace on March 18. I am not persuaded that the testimony offered by the General Counsel, through Kelly and his coworker Dorsey, is more credible than Suttile's and McInerney's accounts. Kelly's testimony was not coordinated with Dorsey's and Dorsey's account was marked by his inability to recollect details. Suttile's account is more persuasive and is credited. I am also not persuaded by the General Counsel that McInerney told Kelly on March 23, as Kelly related, that Kelly was discharged because McInerney believed that Kelly intended to drink the can of beer. McInerney did not need several days of reflection to come to that conclusion. I credit McInerney's account of the March 23 discussion.

#### 3. The April 1 meeting

On April 1, 1982, the Union's national representative, Madden, and Kelly met with the Respondent's president, McInerney, in an effort to persuade McInerney to reinstate Kelly. The testimony submitted at the hearing indicates that, when McInerney was asked why he discharged Kelly, he responded that Kelly (1) committed repeated insubordinate acts, including physical and verbal threats to Suttile, (2) was in a state of "disorientation," (3) was guilty of "chronic absenteeism," (4) had improperly used the Respondent's two-way radio, and (5) had "possession of an alcoholic beverage on company property."

Kelly testified that it was at this April 1 meeting that he had heard for the first time that McInerney offered reasons other than the beer can incident of March 18 for his discharge. There is no probative evidence that he was told earlier that the Respondent based his discharge on any other specific grounds, other than the beer can incident.

#### 4. The Respondent's reason

Testimony bearing on the five grounds cited by McInerney is set out below under subheadings a through e.

##### a. *Insubordination*

Respecting McInerney's assertion that Kelly committed repeated acts of insubordination and misconduct, McInerney referred to an incident that occurred on February 2, 1982. The Respondent's superintendent, Suttile, had observed Kelly sitting at a desk, rocking and barely able to speak. Suttile asked Carlucci what was wrong. Carlucci said that Kelly told him he had taken Tylenol and was feeling ill. Suttile then walked over to Kelly and asked if he was having any problems. Kelly became upset and accused Suttile of being on his back all the time and of assigning him to outside work to "get" him. In making that statement, Kelly leaned toward Suttile in a hostile manner. Suttile testified he felt threatened but it is my observation that he had little to fear and Suttile knew this. In any event, Suttile told Kelly to go home and Carlucci took Kelly by the arm and led him out the door.

Suttile testified that he reported this incident then to McInerney and recommended that Kelly be fired. According to Suttile, McInerney told him then that he did not want to have an unfair labor practice charge filed, and he directed Suttile to call Kelly and to tell him that he could return to work when he was ready to "act as a gentleman."

McInerney testified that Suttile reported the incident to him; Suttile informed him that Kelly had been suspended and suggested that Kelly should be fired. McInerney testified that he told Suttile to call Kelly and to tell him that he could return to work if he would "be reasonable." Suttile then telephoned Kelly. Kelly apologized for his earlier remarks. Kelly returned to work and was paid in full for February 2.

The General Counsel submitted uncontroverted testimony that, about a year previous to the February 1982 incident between Kelly and Suttile, the Respondent's current maintenance foreman had refused to comply with an order given by him by Suttile, that he had in fact got "hot" at Suttile in refusing the order, that Suttile then let him have his own way, and that no discipline resulted from that incident of insubordination.

##### b. *State of disorientation*

Craig Koester, the Respondent's manager of labor relations, testified that on October 2, 1981, he was with a class of students on a tour of the Respondent's facilities being conducted by Kelly. Koester testified that Kelly was "extremely incoherent, somewhat in a stupor . . . smelled of alcohol and acted accordingly." The General

Counsel sought to establish that Kelly was then undergoing extensive oral surgery which impaired his ability to speak clearly.

Koester testified that he related the above incident to McInerney that same day, who then "indicated to [Koester] that he would speak to Suttile about it." McInerney testified that he told Suttile to give Kelly a verbal warning. No evidence was submitted that Suttile gave Kelly such a warning.

On December 11, 1981, when several employees were at the hearing being held in the related representation case in order to contest unit positions then being advanced by the Respondent, the Respondent's chief engineer, Glen Thornhill, visited the pumproom at the North Stamford facility. Thornhill testified that he found Kelly in a state of disorientation on that day and that Kelly reeked of beer. Thornhill further testified that he later told McInerney of Kelly's condition that day and that McInerney told him simply, "When the cat's away, the mice will play." McInerney testified that he told Suttile to warn Kelly. There is no evidence that any such warning issued. The General Counsel endeavored to show that Kelly was not drinking on December 11, 1981, but that he simply had trouble talking clearly because he was then undergoing extensive oral surgery.

McInerney testified that, on March 19, 1982, he talked to Koester and Thornhill about the October 2 and December 11 incidents, and asked them to tell him again of those occurrences and to reduce them to memorandum form. The Charging Party placed in evidence a memorandum signed by Koester and another by Thornhill setting out their respective accounts.

Kelly, as noted earlier, conducted a tour of school children on the day before he was discharged. He also testified without contradiction that he regularly conducted such tours in the period December 1981 until his discharge.

I accept the testimony of Koester and Thornhill and find that Kelly on October 2 and December 11, 1981, was "moderately intoxicated," to borrow Thornhill's characterization as set out in the written account of the December 11 incident.

##### c. *Absenteeism*

The Respondent's records show that Kelly was absent on 26 days in 1981, principally because he had extensive oral surgery. The Respondent has had a practice of granting unlimited sick leave. No evidence was offered to show that Kelly was ever warned against being absent or late.

McInerney testified that, in discharging Kelly, he took into account Kelly's attendance record for 1981 and that he has no recollection of Kelly's attendance record in 1982.

##### d. *The abuse of the two-way radio*

In January 1982, Kelly uttered a "quack, quack" sound over the two-way radio used by the Respondent. Suttile later told him not to do that again and he has complied with that. At that time, various unidentified employees of

the Respondent had been making similar sounds on that two-way radio system.

*e. Possession of alcoholic beverages on company property*

The Respondent's president, McInerney, in his testimony as recounted above, last cited as the reason for Kelly's discharge the fact that he possessed a can of beer while on the Respondent's premises. As noted above, Kelly had gotten this can from the car of a coworker, Jack Dorsey; Dorsey's car was then on the Respondent's premises. McInerney testified that the rule he relied on did not apply to Dorsey in these circumstances as the beer was inside Dorsey's car and thus not directly on the Respondent's premises.

Various witnesses testified as to the existence of any rule of the Respondent respecting the possession or use of alcoholic beverages by its employees. McInerney testified that Kelly had violated the Respondent's "general policy [that] there's no drinking on company premises" and that another part of the rule is that an employee "can't possess alcoholic beverages on [his] person while performing [his] job function." McInerney related further that each violation is handled on a case-by-case basis and that the procedure involves a verbal warning, then a suspension, and then discharge—presumably for three separate offenses.

The overall testimony indicates that possession and consumption of beer on the Respondent's premises is authorized at various times by supervisors and that employees have consumed beer in the lunch area of the Respondent's premises on a routine basis without incident. McInerney himself, as stated above, testified that he was advised by his manager of labor relations in October 1981 and by his executive vice president in November 1981 that Kelly reeked of beer while at work but he did not invoke the "rule" then.

As best as I can determine from the overall evidence, the employees knew from general conversations among themselves that they should not drink while on the job. The existence of such a "rule" appears to be based in the employees' awareness that, about 10 years ago, an employee had been suspended for several days for drinking on the job. McInerney's testimony indicates that the Respondent has no rigid rule and that "common sense" is the controlling consideration.

*f. Discharges of other employees*

The Respondent offered testimony as to its having discharged employees in support of its contention that Kelly's discharge was consistent with established procedures. Thus, its president named two employees who had been discharged for "alcoholic problems." One of those, however, simply disappeared; the other was terminated 5 years ago for "repeated problems." I would have to assume that the repetition was excessive as a current employee, Jack Dorsey, was twice suspended for drinking on the job. McInerney testified that Dorsey was not discharged as he is a longtime employee whereas Kelly had worked for the Respondent only since 1977.

McInerney cited other witnesses of employees' having been discharged. One of them was fired when he was caught stealing; another was let go because he was either unwilling or unable to do an assigned job; a third had been an office employee who apparently was very difficult to deal with.

*G. Analysis*

*1. Alleged interrogation and creating impression of surveillance*

The General Counsel contends that the Respondent unlawfully interrogated employees and unlawfully created the impression that their union activities were kept under surveillance. I have found that, on December 2, 1982, the Respondent's president, McInerney, in his talk to the unit employees, stated that he did not know too much about the Union but that Kelly did. Kelly responded that that was a long time ago. It is apparent, from Kelly's own comment, that he understood then that McInerney had been referring to the fact that, back in 1974, Kelly had been a union member when employed by another water utility. In that context, I find that the evidence is insufficient to establish that the Respondent, on December 2, unlawfully interrogated employees or created the impression of surveillance.<sup>4</sup>

*2. Alleged assignment of more onerous duties*

Respecting the alleged unlawful assignment of more onerous duties to Kelly in the winter of December 1981 and early 1982, because of his union activities, I note that the work records then maintained by Kelly and Carlucci tend to corroborate the Respondent's contention that Kelly was not given more onerous duties. On that basis, I have rejected the conclusionary testimony of Kelly and Carlucci and thus find that the evidence fails to establish that Kelly was assigned more onerous work to discourage membership in the Union.

*3. Alleged discriminatory discharge*

The Respondent asserts that Kelly's union activities were minimal and that it had no knowledge thereof at the time of his discharge. The uncontroverted evidence is that Kelly was, next to Carlucci, the employee most active for the Union. The Respondent's president identified Kelly on December 2, 1981, as the employee the others should look to for more information about the Union and, more importantly, shortly after that meeting, Carlucci (who surfaced shortly thereafter as the Union's witness in the representation case and is the president of its local) told McInerney and Suttile in essence that Kelly and he were the employees responsible for bringing in the Union. I note too Suttile's admission that he knew in the fall of 1981 that Kelly was a supporter of the Union, notwithstanding his other testimony suggesting that he had no knowledge of Kelly's views as to the Union until after Kelly's discharge. I thus find that Kelly was an active union supporter and that the Respondent was aware of that fact when it discharged him.

<sup>4</sup> *American Feather Products*, 248 NLRB 1102, 1111 (1980).

The essential issue for me to decide is whether the General Counsel has established by a preponderance of the evidence that the Respondent, in discharging Kelly, was motivated by a desire to discourage him and other employees from supporting the Union. There is no evidence of independent union *animus*.<sup>5</sup> The timing of his discharge does not permit a ready inference to be drawn of unlawful motivation as, if the Respondent sought to dissuade employees by illegal means from supporting the Union, it seemingly would have done so before they elected the Union as their bargaining representative. That consideration does not foreclose the inquiry as I must consider whether the Respondent's discharge of Kelly was retaliatory for the employees' having selected the Union or was based on its desire to be rid of a borderline employee before it entered into contract discussions with the Union, i.e., whether, "but for" the Union, Kelly would still be in its employ.

The General Counsel and the Union contend that the Respondent seized on the beer can incident of March 18 as a pretext to conceal its unlawful motive in discharging Kelly.<sup>6</sup> That argument is premised on a finding that the General Counsel has offered persuasive evidence that Kelly's discharge was predicated on an unlawful motive, in whole or in part. The evidence on that part is to some extent equivocal. While Kelly was active for the Union and the Respondent had knowledge of that fact, as found above, there is no direct probative evidence of union *animus* on the Respondent's part and the timing of Kelly's discharge is, from General Counsel's viewpoint, equivocal. The difficult aspect of this case arises from the evidence bearing on the Respondent's reasons for discharging Kelly. I have some real doubt as to the validity of the reasons proffered by the Respondent. It cites Kelly's attendance record as a factor but then relies only on its records for 1981 and, in that year, his absences were traceable primarily to the serious oral surgery performed on him then. The Respondent cites two incidents in late 1981 where Kelly apparently had been drinking. He was not warned then or even told that Respondent was concerned. In fact, the Respondent's president passed one of those incidents off with a joking remark, and, as to the other, he testified that he told the Respondent's supply superintendent to issue a warning but that was never done. The Respondent cites, as a further basis for Kelly's discharge, an incident where Kelly uttered a "quack-quack" sound over a two-way radio. The inconsequential nature of that matter is evident from the fact that he was simply told to stop doing that and he

complied. The March 18 beer can incident itself did not result in the imposition of discipline pursuant to an established progressive system of discipline, despite the vain effort of the Respondent to show that it was. The Respondent sought to demonstrate that Kelly was accorded uniform discipline as had been given other employees discharged previously for cause. The Respondent failed in that regard. That is not to say that Kelly was treated in a clearly disparate manner; rather, I could not find any defined disciplinary practice that Respondent followed. Lastly, I note that Suttile's denials of any knowledge of the fact that Kelly was a union adherent, when I find that he was aware of Kelly's views as to the Union, is also a factor to be considered.

On the other hand, I am not persuaded that the General Counsel has shown that all the reasons proffered by the Respondent are insubstantial and pretextual. Thus, Kelly did on February 2 make an unsupported accusation against Suttile and Carlucci had to intervene to lead him away. A month later, Kelly again upset Suttile. Suttile was obviously annoyed by the seemingly casual excuse Kelly submitted then for not reporting to work—a reason which led Suttile to tell Carlucci that Kelly was taking advantage of him.

The totality of the credible evidence supports an inference that Suttile seized on Kelly's possessing a can of beer on March 18 as the "last straw" in view of the February 2 confrontation between Kelly and Suttile and Kelly's taking an excused absence in early March, to Suttile's obvious annoyance. I am not persuaded that a stronger inference of unlawful motivation can be drawn from the overall factual background. At most, I am highly suspicious of the Respondent's motives but suspicions alone are not a substitute for persuasive evidence.<sup>7</sup> In sum, I find that the General Counsel has not shown that the reasons offered by the Respondent were so patently without merit as to permit me to draw a ready inference that its discharge of Kelly was motivated by unlawful considerations. Even were it found that this evidence warranted a shifting of the burden to the Respondent to proffer evidence that its discharge of Kelly was not attributable to his union activities, that burden would have been a relatively slight one and I would find that the Respondent met it.

Thus, I find that the General Counsel has not persuaded me by a preponderance of the credible evidence that Kelly was discharged to discourage his union activities or that the Respondent's discharge of Kelly unlawfully impinged on the rights of employees under Section 7 of the Act.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization as defined in Section 2(5) of the Act.

<sup>5</sup> Considerable testimony was offered at the hearing by the General Counsel and the Union in an effort to establish that the Respondent adopted and imposed new rules which were aimed at penalizing the employees and evidence in support of its contention that it did not engage in any retaliatory conduct. I note that there is no contention that the Respondent, by the alleged new rules, in any way independently violated the Act. In my judgment, the disputes on these collateral points raised related credibility issues which, if resolved favorably to the General Counsel, would still permit only inferences to be drawn. The proffered evidence does not permit a clear determination. To pursue the inquiry into those collateral matters further would serve no useful purpose.

<sup>6</sup> See *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

<sup>7</sup> *Ohio Concrete Products*, 244 NLRB 1161, 1163-64 (1979).

3. The Respondent did not violate Section 8(a)(1) and (3) of the Act in its treatment of John Kelly and did not engage in unlawful interrogation of its employees or create among them the impression that their activities for the Union were being kept under surveillance and, thus, Respondent did not violate Section 8(a)(1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended

#### ORDER<sup>\*</sup>

The complaint is dismissed in its entirety.

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<sup>\*</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.